

REMARKS

New Claim 15 has been introduced, directed to the Example in Table A on page 5, lines 15-25 of the Specification. Care has been taken not to introduce any new matter.

The Present Invention

The present invention relates to a cosmetic composition for skin and hair which delivers a moisturizing effect, without a sticky sensation. The cosmetic non-sticky moisturizer for skin and hair includes

- (a) at least about 10% by weight of the composition of a polyhydric alcohol humectant;
- (b) about 0.01% to about 10% of a polymeric wetting agent which forms a uniform film in a Wetting Test;
- (c) an elastomer;
- (d) a cosmetically acceptable vehicle.

The moisturizing capabilities of humectants, such as glycerol and sorbitol, are concentration dependent. Unfortunately, when incorporated into formulations at concentrations above 10%, they confer a sticky, tacky feeling. Due to this unpleasant consumer sensory experience, formulations containing higher levels of humectants are, for the most part, not commercially acceptable. The present invention meets the need for commercially acceptable moisturizing compositions containing higher levels of humectants. The polymeric wetting agent may be an amphipathic block copolymer, a polymer containing a hydrophilic backbone modified with hydrophobic groups, or mixtures thereof AND, *specifically, the polymeric wetting agents are selected for inclusion in the inventive compositions by testing the polymer in a Wetting Test.*

The data in Tables A and B at page 5 of the present specification show that not all polymers form a uniform film in a Wetting Test. For example, while Pemulen TR2 forms a uniform film, Carbopol 981 does not. *The cited art does not disclose or suggest the selection of polymers that meet the Wetting Test in order to avoid stickiness in compositions containing more than about 10 % polyhydric alcohol.*

There is No Obviousness under 35 USC § 103 Over Beerse et al.

Claims 1, 3-8 and 10-14 were rejected under 35 USC 103(a) as being unpatentable over Beerse et al. (US 6,294,186). (Claim 2 was previously cancelled). According to the Office Action, the Beerse et al. compositions may contain from about 0.1% to about 20% lipophilic skin moisturizing agents/emollients such as polymethyl siloxanes, methylphenylpolysiloxanes, dimethicones, cyclomethicones, alkyl siloxanes and oils (col. 10, line 7 to col. 11, line 16); Dimethicone copolyol emulsifiers are useful in Beerse (col. 15, line 36 to col. 16, line 59). Beerse's composition may also contain conditioning agents selected from humectants, moisturizers or skin conditioners in an amount from about 0.1% to about 20%, and examples of moisturizing agents are polyhydroxy alcohols such as sorbitol, glycerol, hexanetriol, propylene glycol (col. 36, lines 14-35). Beerse et al provide an example of thickening agents that can be contained in the composition and specific examples of PEMULEN TR-2 and PEMULEN TR-1 are listed (col. 36, line 54 to col. 38, line 23).

Therefore, according to the Office Action, it would have been obvious to one of ordinary skill in the art at the time the invention was made to increase the amount of polyhydric alcohol in the hand composition in examples 14 and 15 of Beerse from 3.08 to about 20-28%, since Beerse in examples 16-18 teaches hand composition that contains 20-28% polyhydric alcohol.

Applicants respectfully traverse. *Beerse et al. relates to antimicrobial compositions comprising benzoic acid. Beerse et al. do not disclose or suggest a selection of Pemulen TR2 over Pemulen TR1.*

Beerse et al Do Not Suggest the Selection of PEMULEN TR-2 Over TR-1 or Over CARBOPOL

Beerse et al may disclose Pemulen TR1 and Pemulen TR2, however, the data in the present Specification show that Pemulen TR-2 but not Pemulen TR-1 meets the Wetting Test. Carbopol 981 disclosed in Beerse et al likewise does not meet the Wetting test. Examples 14 and 15, cited as containing PEMULEN TR-1 and CARBOPOL in addition to glycerin, butylene glycol, cyclomethicone and dimethicone copolyol, cyclomethicone and dimethicone, dimethicone copolyol, salicylic acid and water, teach away from the present invention. As discussed, the data in the present Specification indicate that CARBOPOL and Pemulen TR-1 are outside the scope of the present invention, since it does not meet the Wetting Test. The unique combination of components in the claimed amounts according to the present invention yields an unexpectedly moisturizing but non-sticky composition.

Beerse et al. describe the presence of Carbopol in Examples 14 and 15, while Applicants have shown that Carbopol 981 does not meet the Wetting test. With its broad disclosure, covering products from personal care to household care, Beerse et al. fail to disclose or suggest *the selection of* polymeric wetting agents that meet the Wetting Test, i.e., that form a uniform film in a Wetting Test. *The selection is critical to the present invention, as shown by the objective evidence presented in the Specification. This evidence must be considered as rebutting any prima facie case of obviousness that may have been made out by the Office Action.*

Viewed As a Whole, the Invention is Not Obvious over Beerse et al.

An obviousness rejection is proper only when "the subject matter as a whole would have been obvious at the time the invention was made ..." (emphasis added). 35 U.S.C. 103. Applicants respectfully submit that the Office Action has improperly picked and chosen certain aspects of the reference, without showing where the motivation is to combine them to come up with the subject matter of the present invention as a whole, within the meaning of 35 U.S.C. 103. The disclosure of Beerse et al. is extremely broad, covering products from personal care to household care, and one skilled of the art would not be led by this disclosure to select the compositions having the claimed essential elements in the particular combination. Humectants are described as Optional ingredients. See Col. 19, line 51 together with the text that follows through Col. 36 and further. Thickening agents are optional. See Col. 36. Carbomers and Alkyl Acrylates, including Carbopols and Pemulens, are optional. See Col. 37-38. Silicone elastomers are *optional*. See Col. 38, 40.

The present invention, as set forth in the independent claims 1 and 8, and the claims dependent thereon require the following elements to be present at the same time:

- (1) greater than about 10 % polyhydric alcohol humectant, and
- (2) about 0.01 % to about 10 % polymeric wetting agent, and
- (3) the polymeric wetting agent must meet the Wetting Test.

As shown in the Specification on page 4, lines 18-20, PEMULEN TR-2 meets the Wetting Test, whereas PEMULEN TR-1 and CARBOPOL 981 do not. See, also, Tables A and B on page 5 of the Specification. Therefore, the materials that do not meet the Wetting Test are excluded from the scope of the present invention. Additionally, a comparison is made in Example 1 on page 12 of the specification, showing composition containing CARBOPOL 981 which did not form a uniform film in a Wetting Test, and compositions within the selection of the present invention, containing PEMULEN TRII which met the Wetting Test. Examples 3 and, beginning

on page 14 of the Specification, show comparative data from which it can be seen that increased concentration of glycerol leads directly to decreased dryness, yet also, unfortunately, increased stickiness. However, inclusion of polymeric wetting agents reduces stickiness while maintaining the moisturization effect.

Furthermore, Claim 8 excludes additional, non-essential components, such as the antimicrobial materials (e.g. benzoic acid and acid salt) that are essential to the Beerse et al. compositions. At the same time, Claim 8 requires as essential components those that may be mentioned in Beerse et al. as optional.

Examples 16-18 were cited as teaching hand compositions that contain 20% glycerin, 8% dipropylene glycol, 22.8-28.09% water, 4% isopropyl palmitate, 9.1-13% cyclomethicone, 11-14.55% cyclomethicone/dimethicone copolyol, salicylic acid, fragrance, etc. However, there is no mention of the claimed wetting agents that meet the Wetting Test, which are essential to the present invention.

The Court of Appeal for the Federal Circuit has repeatedly held that when making out a *prima facie* case of obviousness, the focus must be on the invention as a whole,

That features, even distinguishing features are "disclosed" in the prior art is alone insufficient. As above indicated, it is common to find elements or features somewhere in the prior art. Moreover, most if not all elements perform their ordained and expected function. The test is whether the claimed invention as a whole, in light of all the teachings of the references in their entireties, would have been obvious to one of ordinary skill in the art at the time the invention was made. 35 U.S.C. 103.

Connell v. Sears, Roebuck & Co., 722 F.2d 1542, 1549, 220 U.S.P.Q. 193, 199 (Fed. Cir. 1983).

Applicants have shown that the teachings of the cited reference in its entirety would not lead one of ordinary skill in the art to the claimed invention. Contrary to Beerse et al and the belief expressed in the Office Action, the present compositions are not antimicrobial compositions, but, rather, moisturizing compositions, as is clearly defined in the present claims. Furthermore, there is no disclosure or suggestion in Beerse et al. to select the claimed combination of greater than 10 % polyhydric humectant (i.e., a relatively high level which would otherwise make the composition sticky) with polymeric wetting agent that meets the Wetting Test in order to achieve a non-sticky moisturizer of the present invention. The cited reference concerns other aspects that are not related to the composition elements as claimed.

Applicants submit that the pending claims 1, 3-8, 10-14 are not obvious over Beerse et al., under 35 U.S.C. 103. Reconsideration and withdrawal of the rejection is respectfully requested.

Respectfully submitted,



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